NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS

v.

SEASIAN HOTEL SDN. BHD. (ORCHARD SUN PENANG)

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[ORGINATING MOTION NO. R8-32-124-87]
22 FEBRUARY 1992

ADMINISTRATIVE LAW: *Order of certiorari to quash Industrial Court Award - Issue - Whether special circumstances exists to vary the collective agreement - No evidence to show something out of the ordinary or something uncommon had taken place - Section 56(2)(c) Industrial Relations Act.*

This is an application seeking an order of *certiorari* to quash the Industrial Court Award No. 279 of 1987 dated 24 September 1987.

Counsel for the applicant contended that there were no special circumstances in this case to vary the collective agreement under s. 56(2)(C) of the Industrial Relations Act. Whereas the Counsel for the respondent, argued that the Industrial Court had the power to vary the collective agreement under the said section of the Industrial Relations Act. It was contented that there were special circumstances in the present case to justify the Industrial Court to vary the collective agreement.

The main issue before the Court is whether there are special circumstances in the present case to justify the Industrial Court to vary the collective agreement. It was also stated by the respondent that it was unable to comply with the collective agreement due to the severe financial losses since its inception and continued to be so. This severe financial losses purpotedly suffered by it was cited as a special circumstance within the meaning of s. 56(2)(c) of the Act.

Held:

[1] In my opinion there are no special circumstances in the present case. There was no sudden disaster (physical or financial) that struck the company after the collective agreement was entered into. I find no evidence to show something out of the ordinary or something uncommon that had taken place after the collective agreement had come to force. All that happened was that the respondent had suffered losses right from its inception.

[2] I am satisfied that in the present case, the Industrial Court had exceeded its jurisdiction when it varied the Collective agreement. There was no evidence of special circumstances to justify the Industrial Court to do so.

[Order that the award be quashed with costs.]

Cases referred to:

Banker's Union v. Clarks of Hove Ltd. [1978] ITR 356 ***(foll)***
Plantation Agencies Sdn. Bhd., Penang v. National Union of Commercial Workers [1984] ILR 16 ***(foll)***
SPK-Invicta Sdn. Bhd. v. Manickam Aseervatham [1986] ILR 1065 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 16, 56(2)(c)

For the applicant - B. Lobo; M/s. Lobo & Associates
For the respondent- C.K Cheah; M/s. B.C. Teh & Co.

JUDGMENT

Zakaria Yatim J:

In this notice of motion the applicant is asking the Court to grant an order of *certiorari* to quash the Industrial Court Award No. 279 of 1987 dated 24 September 1987.

On 20 November 1984 the applicant and the respondent entered into a collective agreement, which was duly deposited with the Industrial Court pursuant to s. 16 of the Industrial Relations Act 1967 and taken cognizance of, *vide* Cognizance No. 71/1985. It was a term and condition of the collective agreement that the respondent would grant annual increments to its employees.

Article 2 of the collective agreement provided that the collective agreement came into force on 1 April 1984 and "... shall continue to remain in force until 31 March 1987 and thereafter unless superseded by a new collective agreement or an Industrial Court Award ..." By a letter dated 3 March 1987, the respondent requested for a meeting with the applicant to discuss the payment of the 1987 annual increment pursuant to Article 10 of the collective agreement. The respondent's proposal was to freeze the 1987 annual increments. The applicant, requested for copies of the respondent's audited accounts for the years 1984, 1985 and 1986 which were duly supplied. By a letter dated 23 June 1987 the applicant rejected the respondent's proposal. The matter was then referred to the Industrial Court.

Before the Industrial Court, the respondent admitted non-compliance with the collective agreement but asked for a variation of Article 10 of the collective agreement.

The Industrial Court, in its Award varied Article 10 and stopped the March 1987 annual increments. Paragraph 6 of the Award clearly states:

> 6. With respect, we do not agree with the English Law Lord. Insolvency arising from a "gradual run-down" can be a nominal or excessive amount. We are required to apply equity, good conscience and substantial merits of the case, without regard to technicalities and legal form under s. 30(5) of the Act. In the circumstances of this particular case we are unanimously of the view that it constitutes special circumstances under s. 56(2)(c) and should allow us to stop the March 1987 annual increment. We have listened to the evidence of the Financial Controller (CW1) of the Hotel and we are convinced that the Hotel has gone very far to implement cost cutting measures. The supervisory and management staff has forgone two years of increments and bonus to tide the Hotel over difficult times and it will not be too much for us to order that increments under the agreement be cancelled for one year only. If the Hotel suddenly flourishes, there is nothing to stop the Hotel from giving the workers a double increment next year! We have looked hard at our conscience. We can forsee further retrenchments beyond the 60 workers already retrenched if business does not improve. It will be better for the 280 workers to do with one increment less, than for some more of them to be retrenched! We have exercised our conscience and we boldly act with equity and industrial justice.

Mr. Lobo, Counsel for the applicant contended that there were no special circumstances in this case to vary the collective agreement under s. 56(2)(c) of the Industrial Relations Act. Mr. C.K. Cheah, Counsel for the respondent, on the other hand argued that the Industrial Court had power to vary the collective agreement under s. 56(2)(c) of the Act. He added that there were special circumstances in the present case to justify the Industrial Court to vary the collective agreement.

The main issue before the Court is whether there are special circumstances in the present case to justify the Industrial Court to vary the collective agreement. Section 56(2)(c) states:

The Court may, upon receipt of the complaint,:

(c) make such order it considers desirable **to vary** or set aside **upon special circumstances any term of the award** or **collective agreement.** (Emphasis added)

Mr. Lobo referred to the decision of the English Court of Appeal in *Banker's Union v. Clarks of Hove Ltd.* [1978] ITR 356. In that case, Geoffrey Lane LJ, in his judgment at p. 364 said:

What, then is meant by 'special circumstances?' Here we come to the crux of the case. In this aspect, also the decision under the Road Traffic Acts appear to me to be unhelpful. The decisions are too well known to need reference. The basis of them all is probably *Whitttall v. Kirby* [1978] ITR 356 in 1946:

A special reason is one special to the facts of the particular case, special to the facts which constitute the offence. A circumstance peculiar to the offender, as distinguished from the offence, is not a special reason.

In sofar as that means that the special circumstances must be relevant to the issue then that would apply equally here, but in these circumstances, the Employment Protection Act 1975, it seems to me that the way in which the phrase was interpreted by the industrial tribunal is correct. What they said, in effect, was this, that insolvency is, on its own, neither here nor there. It may be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If for example sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which was capable of being a special circumstance; and that is so whether the disaster is physical or financial. If the insolvency, however, was merely due to a gradual run-down of the company, as it was in this case, then those are facts on which the industrial tribunal can come to the conclusion that the circumstances were not special. In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word "special" in the context of this Act..

In my opinion the passage quoted above applies to the present case. The Industrial Court, in its award, quoted the above passage but refused to follow what Geoffrey Lane LJ had stated in that passage.

The special circumstances must arise after the signing of the collective agreement. See *Plantation Agencies Sdn. Bhd., Penang v. National Union of Commercial Workers* [1984] ILR 16 at p.17. See also *SPK-Invicta Sdn. Bhd. v. Manickam Aseervatham* [1986] ILR 1065 at p.1066.

In its statement of reply before the Industrial Court, the respondent stated that it was unable to comply with the collective agreement due to severe financial losses since its inception and continued to be so. The severe financial losses suffered by it was a special circumstance within the meaning of s. 56(2)(c) of the Act.

The only evidence before the Industrial Court was that the respondent had suffered losses from its inception until 1987. From the respondent's audited accounts the respondent suffered losses of RM5,028,284 in 1984, RM5,533,752 in 1985 and RM6,063,542 in 1986.

It is evident that when the collective agreement was entered into in 1984 the respondent had already suffered losses. It continued to suffer losses in 1984, 1985 and 1986.

In my opinion there are no special circumstances in the present case. There was no sudden disaster (physical or financial) that struck the company after the collective agreement was entered into. I find no evidence to show something out of the ordinary or something uncommon that had taken place after the collective agreement had come to force. All that happened was that the respondent had suffered losses right from its inception.

The present case is similar to the case, *Universal Cables Sdn. Bhd. v. Electrical Industry Workers Union* (O.M No. R8-32-38-87Unreported). In that case there was a collective agreement dated 31 January 1986 which was duly deposited with the Industrial Court. When the collective agreement was signed, Universal Cables was in fact suffering a loss of RM15.3 million. Universal Cables failed to comply with the collective agreement. Counsel for Universal Cables asked the Industrial Court to vary the collective agreement under s. 56(2)(c). The Industrial Court varied the agreement. Harun J, as he then was, found that there were no special circumstances in that case and quashed the award with costs. In his judgment, Harun J said:

> I think the Industrial Court exceeded its jurisdiction in varying the collective agreement and ordering the company not to pay. It was definitely against all authority ... If the company is suddenly saying that it has no money to pay and therefore it becomes a special circumstance in order to avoid payment, then I think it will make nonsense of the collective agreement ... The company had even admitted breaching the terms of the collective agreement by not paying the annual increment and bonus ... See *The Star* dated 23 July 1987 which was exhibited to the applicants' affidavit.

Universal Cables appealed to the Supreme Court against the decision of Harun J *vide* Civil Appeal No. 377-1987. On 7 March 1988, the Supreme Court dismissed the appeal.

I am satisfied that in the present case, the Industrial Court had exceeded its jurisdiction when it varied the collective agreement. There was no evidence of special circumstances to justify the Industrial Court to do so.

In the circumstances I order that the award be quashed with costs.

Also found at [1992] 2 CLJ 865